COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2013-00166

COMMONWEALTH

vs.

QUOIZEL L. WILSON

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTIONS FOR NEW TRIAL AND EVIDENTIARY HEARING

Quoizel L. Wilson, the defendant, was convicted after a jury trial in May, 2015 of first degree murder, on the theories of deliberate premeditation and extreme atrocity and cruelty; assault and battery with a dangerous weapon; and illegal disposal of a body. The Supreme Judicial Court stayed the direct appeal of the conviction pending the outcome of the defendant's motion for new trial and related motion for an evidentiary hearing.[1] The defendant's motion argues that a new trial is warranted because the recent decision of the Supreme Court of the United States in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), as well as the prior decision of the Supreme Judicial Court in *Commonwealth* v. *Augustine*, 467 Mass. 230 (2014), require the suppression of the defendant's cell-site location information ("CSLI") originally obtained without a warrant. The defendant also raises an ineffective assistance of counsel claim, arguing that he was prejudiced by trial counsel's failure to move to suppress a multitude of evidence obtained as a result of the aforementioned CSLI. After careful consideration of the record,

[1] This motion is before this jurist, Robert C. Rufo, in my capacity as the Regional Administrative Justice for Barnstable, Dukes and Nantucket, due to the retirement of the trial judge, Hon. Gary A. Nickerson, in August, 2018.

exhibits, and memoranda, the defendant's motions for new trial and evidentiary hearing must be **DENIED** for the following reasons.

BACKGROUND

On July 28, 2010, Trudie Hall (the "victim"), a Nantucket resident, was reported missing from Yarmouth. The victim's remains were not discovered until April 19, 2012, by a man walking his dog in a wooded area near a water tower off Hayway Road in Falmouth. The defendant was subsequently convicted of her murder.[2] The following are the facts the jury could have found and that are necessary to resolve the defendant's motion for new trial. Some facts relating to the investigation into the victim's disappearance, which were not admitted at trial but are nevertheless relevant to the defendant's suppression arguments, are reserved for later discussion.

On July 27, 2010,[3] the victim, visibly pregnant, travelled from Nantucket to the Bayside Resort motel in Yarmouth, where she and her husband, Ram Rimal, checked-in to separate rooms.[4] The pair planned to travel together in a rental car[5] to a meeting in Boston the following day.[6] Rimal last saw the victim at approximately 9:30 p.m. on July 27, when he retired to his room for the evening after the victim left in the rental car, stating she was going to run an errand.

In the morning, on July 28, Rimal could not locate the victim or the rental car, and the victim's personal effects were still in her room. Concerned, Rimal contacted the victim's mother, Vivienne Walker. Like Rimal, Walker could not reach the victim on her cellular telephone ("cellphone"), so she travelled from Nantucket to Cape Cod to search for her. Rimal

---

[2] The defendant was also convicted of assault and battery with a dangerous weapon, and illegal disposal of a human body.
[3] All dates hereafter are in 2010, unless otherwise noted.
[4] Rimal's marriage to the victim was of questionable legality, and the pair did not cohabitate as a typical couple.
[5] The car was rented to Rimal, but the victim drove it during the period in question.
[6] It could be inferred that the Boston meeting was with immigration officials regarding Rimal's status as the victim's purported husband.

accessed the victim's cellphone call records, and shared them with Walker, who called all of the numbers that had been in contact with the victim on the previous day. Walker then reported the victim as a missing person to the Barnstable and Yamouth Police Departments. Walker told officers that the victim was pregnant, and that the unborn baby's father was a married man. Walker told police that she had received a phone call a few weeks prior from a woman who made "slanderish" remarks about the victim and the baby; Walker concluded that the caller was the wife of the baby's father. Walker stated that she was unsure of the identity of the baby's father or his wife. In response to this report, police put out a Be-On-the-Look-Out ("BOLO") broadcast for the victim's rental car, and investigated her whereabouts.

On July 29, police received information that the victim's cellphone had been active in the Route 132/Independence Park area of Hyannis during that afternoon. After a search of the area, police located the victim's rental car in the back corner of the Route 6 commuter parking lot in Barnstable at approximately 8:30 p.m. The car was towed to the Barnstable Police Department, where it was searched pursuant to a warrant. Inside the car, there was blood spatter, two spent projectiles, suspected bone fragments, and a piece of human flesh. The responding medical examiner concluded from the car's condition that a person had been injured severely enough that the attendant blood loss could be fatal if not treated. Forensic testing would later match the victim's DNA to the blood and tissue inside the car, and determine that the projectiles were fired from an unknown weapon capable of firing a .38 caliber ammunition, including a 9 mm caliber handgun.[7] A check of the Massachusetts Firearms License database showed that the defendant

[7] Forensic investigators also located a finger print on the front of the rental car, belonging to Steven Newcomb, which was covered by the victim's blood. Newcomb had no apparent connection to the case, and testified that he had tripped outside a convenience store prior to the victim's disappearance, and steadied himself on the front of an unknown nearby vehicle, presumably the rental car which the victim later drove. None of the forensic evidence (blood, DNA, finger prints, fibers, etc.) found in or on the rental car was linked to the defendant's person.

was the registered owner of a 9 mm Beretta 92FS handgun, and that it had not been reported stolen to date.[8]

At approximately 1 a.m. on July 30, shortly after the discovery of the bloody rental car, police went to the defendant's house in Centerville to interview him and his wife, Donna Wilson. The defendant told officers he had been friends with the victim for five years, since the time he previously lived on Nantucket. The defendant stated he spoke to the victim several times by cellphone on July 27, and met up with her that afternoon at the Bayside Resort for approximately 30 to 40 minutes. The defendant told police that he and the victim had planned to meet up again later that evening, but he text messaged her around 10 p.m. to tell her he was not coming. The defendant claimed he had no further contact with the victim, and denied any involvement in her disappearance. The defendant admitted to officers that he had heard a rumor that the victim was pregnant, but insisted that their relationship was platonic, not sexual. The defendant also stated he heard a rumor that the father of the victim's unborn baby could be a man named Dwayne who lived on Nantucket.

On August 2, the Commonwealth obtained a subpoena for cellphone call detail records ("call logs") from the victim's number, the defendant's number, and a third number belonging to the defendant's wife.[9] The victim's call logs showed that her number exchanged more than 100 text message and phone calls with the defendant's number on July 27. The victim's calls with the defendant continued until approximately 10 p.m. Between 10:09 and 10:18 p.m., the victim's number made eleven calls, each lasting mere seconds, to a number identified as

[8] Investigators also knew that the defendant's license to carry a firearm was suspended, and that the defendant had not turned in the 9 mm Beretta 92FS to any local police departments, as required by the suspension order. There was additional testimony at trial from a firearms dealer who sold the defendant a 9 mm Beretta 92FS pistol in 2008, and from a Barnstable town employee who issued the defendant a firing range permit, also in 2008.

[9] These records did not contain any CSLI. The defendant does not argue that the call logs should have been suppressed.

belonging to Mawande Senene. The victim's cellphone lost connectivity at approximately 11 p.m, after which the defendant's number had two calls with his wife's number. On July 28, there were two data transmissions from the victim's number, but no other activity before or after that date.

On August 2, police interviewed Senene regarding the series of calls the victim's number made to his number. Senene stated that around 11 p.m. on July 27, he noticed several missed calls from the victim's number, but did not recognize it. Senene stated there was also a voicemail message from a woman identifying herself as "Rudy, Trudie, or Judy", who stated that she did not know Senene but that he should call her back. Senene stated that he deleted the voicemail, and called the defendant since the number had a Nantucket exchange and Senene knew the defendant used to live on the island. Senene said the defendant spoke to him, but didn't comment regarding the voicemail. Senene denied meeting up with the defendant or the victim on July 27. Senene stated that he knew the defendant carried a handgun when at events with the motorcycle group both men belonged to, and that the defendant had said he "only carried sixteen," which Senene interpreted to mean sixteen bullets in the defendant's gun.

On August 3, the Commonwealth acquired an order of the Barnstable District Court under 18 U.S.C.A. § 2703(d) for the production of CSLI from the numbers of the victim, the defendant, and the defendant's wife ("§ 2703(d) order"). [10] The § 2703(d) order included CSLI from the period of May 1 to August 2. The application for the § 2703(d) order was not supported by a written affidavit. Instead, the District Court judge based his findings on a State Trooper's in

[10] Section 2703(d) of the Federal Stored Communications Act, 18 U.S.C. § 2701 et seq. (2006), allows a court of competent jurisdiction to issue an order requiring a cellular telephone company to disclose certain types of records of customers to a governmental entity if the government establishes that "specific and articulable facts" show "reasonable grounds to believe" that the records "are relevant and material to an ongoing criminal investigation."

camera oral testimony about the investigation into the victim's disappearance; this testimony was not recorded.

The CSLI showed that both the defendant's and the victim's cellphones traveled together between approximately 9:45 p.m. and 11 p.m. on July 27, from the Route 6 commuter parking lot, along Service Road, to East Falmouth where the victim's cellphone lost connectivity. Of particular importance, the defendant's cellphone used a tower near Hayway Road in East Falmouth between 10:44 and 10:53 p.m. The defendant's cellphone then called his wife's number at 11:11 p.m., using a "short tower", a cell site mounted to a telephone pole with limited range, on Sandwich Road. This short tower was 0.623 miles from the location where the victim's body was eventually found, and had a limited range. The defendant's cellphone then transmitted data using towers in the Mashpee area from 11:16-11:18 p.m., and received a call from his wife using the tower by the Route 6 commuter parking lot, where the victim's car was later found, at 12:16 a.m. At 12:29 a.m., the defendant's cellphone used a tower near his home in Centerville.

The CSLI also revealed the location of the victim's cellphone during the only activity occurring after the victim was reported missing. At 6:59 a.m. on July 29, a data transmission originated near the Rochester, MA business location of the defendant's employer, United Waste Management, within minutes of the time the defendant's garbage truck was logged as present at the location. At 5:16 p.m. that day, another data transmission occurred over a period of 25 minutes, using a tower to the east of the Route 6 commuter parking lot and to the east of Service Road.

After police had received this CSLI, the defendant initiated contact with detectives, requesting a meeting to correct statements he made in the July 29 interview. The detectives met

the defendant at a public location on August 3, where he admitted having a sexual relationship with the victim, and providing her financial support. The defendant also admitted that he was possibly the father of the victim's unborn baby, and that he had asked her to keep the pregnancy a secret. After detectives inquired about the whereabouts of the defendant's registered Beretta 9 mm handgun, he claimed that it had been stolen in Mississippi in 2008, but he had not reported the theft for fear of consequences arising from his suspended firearm license. After the defendant made these statements, the detectives confronted the defendant, telling him that they knew based on the newly-acquired CSLI that he was not at his house on the night of July 27, as he had claimed. The defendant replied that he had actually been driving on Service Road that evening to sell cocaine to a friend, "J.D." The defendant also stated he had traveled down Route 28 to Newtown Road at some point that evening. After making these admissions, the defendant consented to a search of his vehicles.

On August 4, police interviewed Joseph D. ("J.D.") Lang. At first, Lang stated that he met the defendant on July 27 at approximately 10 p.m. on Service Road between Exits 4 and 5 of Route 6. Later in the interview, Lang admitted that his initial statement was a lie, and that he had stayed home in Harwich all night.[11] Lang told police that he lied because the defendant called him on the evening of August 3, telling Lang that someone would be calling him and he should lie and say he met the defendant at that place and time.

Police also re-interviewed Mawande Senene on August 4. At that time, Senene told police that he had omitted something from his previous statement. Senene said that he received a call and text message from the defendant on July 29, asking him to come to the defendant's house, which he did. Senene said that the defendant told him that people might try to contact

[11] Police had obtained CSLI for Lang's cellphone number, which showed the device in Harwich on the evening of July 27.

him about whether the defendant and Senene were together on the night of July 27. Senene told police that the defendant never told him exactly what to say to the caller, but Senene's impression was that the defendant wanted Senene to be an alibi for July 27.

On August 5, police searched the defendant's residential property, including the home, attached garage, and driveway, pursuant to a search warrant. The scope of the warrant included, amongst other things, evidence of blood, weapons, firearms, and the victim's cellphone. Police seized several cellphones, multiple handgun accessories, a pistol manual for a 9 mm Beretta 92FS, and a green towel with red-brown stains.[12] During the search, a forensic chemist swabbed the defendant's motorcycle, which was parked inside the residence's garage, and the defendant's SUV, which was parked in the residence's driveway. The swabs from the side of the motorcycle and the inside of the SUV's driver area tested positive for the presumptive presence of blood. The SUV and motorcycle were seized at that time, and towed to the state police barracks.

That same day, the defendant accompanied investigators to the police station for a further interview, during which he repeated his claim that he had met up with the victim at the Yarmouth motel, but did not meet up with her at 10 p.m. as planned because his motorcycle was broken. The defendant also repeated his claim that he had met up with Lang instead to do a drug deal. Investigators told the defendant that they had spoken to Lang, who told them the defendant was lying, and asked the defendant whether he carried a gun. Investigators also told the defendant they knew he had called his wife two times that night. The defendant replied that he "made a joke once about carrying a gun," and owned a 9 mm handgun. The defendant insisted it was Lang who was lying, that he had not gone anywhere else that evening, and that he had only called his wife one time. Investigators also told the defendant that his CSLI showed that on the

[12] The affidavit in support of this search warrant relied in part on the CSLI for the defendant and victim, which had been obtained in the preceding days.

evening of July 27, he was in Sandwich, then Mashpee, then Falmouth. The defendant denied being in Mashpee or Falmouth.

On August 6, police obtained search warrants for the defendant's SUV and motorcycle.[13] The warrants were executed on August 9, and police seized swabs from the vehicles, keys, invoices, receipts, and a Barnstable firing range permit in the defendant's name.

The victim's body was eventually discovered on April 19, 2012, by a man walking his dog in a wooded area near a water tower off Hayway Road in Falmouth. Employment records showed that Hayway Road was on the defendant's garbage truck route. Further, the site where the victim's remains were found was only 0.623 miles from the limited-range "short tower" on Sandwich Road that the defendant's cellphone had connected to shortly after the victim's cellphone activity ceased on the night of her disappearance, July 27, 2010.

Seven spent projectiles and one projectile jacket were recovered from the site of the remains: they were .38 caliber ammunition with similar rifling patterns to those recovered in 2010 from the victim's rental car, but the individual markings on the projectiles were insufficient to conclude that they were all fired from the same weapon. A forensic anthropologist determined that the victim's body had been outside for at least a year, and showed signs of gunshot trauma. A paternity test of the fetal remains indicated that there was a 99.9999% probability that the defendant was the father.

PROCEDURAL HISTORY

Where the defendant's claim for a new trial rests on the impact of the evolution of federal and state constitutional law throughout the pendency of his case, this court sets out the

[13] The affidavits in support of these search warrants relied in part on the CSLI for the defendant and victim obtained on August 3, 2010.

procedural history of the defendant's case while also noting the contemporaneous developments in case law.

On November 12, 2013, a Barnstable County grand jury returned indictments against the defendant, charging him with murder in the first degree, assault and battery with a dangerous weapon, and illegal disposal of a human body. On February 18, 2014, the Supreme Judicial Court issued its decision in *Commonwealth* v. *Augustine*, 467 Mass. 230 (2014) (*Augustine I*), holding that art. 14 of the Massachusetts Declaration of Rights protects against the warrantless search and seizure of CSLI for periods of two weeks or more, and remanding the case to the trial court to determine if the affidavit supporting the § 2703(d) application contained sufficient probable cause to meet the warrant requirement. On August 6, 2014, the Commonwealth obtained a search warrant for the same portion of the defendant's CSLI that it had previously collected pursuant to the § 2703(d) order obtained on August 3, 2010.

In pretrial proceedings, the trial counsel moved to suppress the CSLI of the defendant and the victim, but did not further move to suppress evidence resulting from that CSLI as fruit of the poisonous tree.[14] The trial judge held an evidentiary hearing, taking testimony from the State Trooper involved in the District Court's § 2703(d) order. On January 21, 2015, the trial judge denied the motion to suppress, and thereafter denied the defendant's motion for reconsideration. On March 11, 2015, the Supreme Judicial Court issued its decision in *Commonwealth* v. *Augustine*, 470 Mass. 837 (2015) (*Augustine II*), finding that the original affidavit filed in support of the § 2703(d) order in that case provided sufficient probable cause to meet the warrant requirement of art. 14, and thus the CSLI should not be suppressed. During pretrial proceedings, the Supreme Judicial Court issued its decision in *Commonwealth* v. *Estabrook*, 472 Mass. 852

[14] In his motion for new trial, the defendant does not renew his argument as to the suppression of the victim's CSLI. Accordingly, that issue is waived and will not be addressed herein.

(2015), holding that CSLI originally obtained pursuant to a § 2703(d) order accompanied by an affidavit which did not provide probable cause was nevertheless admissible pursuant to an after-acquired search warrant supported by probable cause independent of the illegally-acquired CSLI.

After a jury trial in May, 2015, the defendant was convicted on all counts. During the pendency of the defendant's direct appeal of his conviction under G. L. c. 33E, there was a further development in the applicable case law: the United States Supreme Court held in *Carpenter* v. *United States*, 138 S.Ct. 2206 (2018), that the Fourth Amendment to the United States Constitution also required a search warrant for CSLI. The defendant thereafter filed this motion for new trial, arguing that the trial judge erred in admitting the CSLI, and that trial counsel provided ineffective assistance by failing to move to suppress the evidence resulting from the CSLI, as fruit of the poisonous tree.

DISCUSSION

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b), as appearing in 435 Mass. 1501 (2001). In the absence of a constitutional error, the granting of a motion for a new trial is within the discretion of the trial judge on the basis of either occurrences at trial, *Commonwealth v. Vaidulas*, 433 Mass. 247, 250 (2001), or the discovery of new facts that bear on the question of the defendant's guilt, *Commonwealth v. Pires*, 389 Mass. 657, 664-666 (1983). However, such discretion should only be exercised in exceptional situations where "the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth". *Commonwealth* v. *Wheeler*, 52 Mass. App. Ct. 631, 635-636 (2001).

In considering the new trial motion, the court may base its decision entirely on the motion and accompanying exhibits, unless it determines that a substantial question was raised by

the submissions which requires an evidentiary hearing. Mass. R. Crim. P. 30(c)(3); *Commonwealth* v. *Stewart*, 383 Mass. 253, 259-260 (1981). "In determining whether a substantial issue meriting an evidentiary hearing under rule 30 has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." *Stewart*, 383 Mass. at 257-258 (internal quotations omitted). "A defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, but they must contain sufficient credible information to cast doubt on the issue. A judge may also consider whether holding a hearing will add anything to the information that has been presented in the motion and affidavits." *Commonwealth* v. *Goodreau*, 442 Mass. 341, 348 (2004).

I. Motion for an Evidentiary Hearing

Here, the defendant's submissions have not raised a substantial issue which cannot be decided from the motion papers and records of pre-conviction proceedings. The critical issue is one of law: whether *Carpenter* and/or *Augustine I* require the exclusion of the defendant's CSLI data, and any evidence resulting therefrom. Because this court decides that the CSLI should not have been suppressed as a matter of law under art. 14 or the Fourth Amendment, and that a motion to suppress fruit of the poisonous tree would not have given the defendant a substantial ground of defense, there is no need for an evidentiary hearing to determine the state of police knowledge at any point in the investigation, or the basis for trial counsel's pretrial decisions. For those reasons, the defendant's motion for an evidentiary hearing is **DENIED**, and his motion for new trial shall be decided entirely on the papers.

II. Suppression of the Defendant's CSLI

A. Fourth Amendment to the United States Constitution

The defendant's first argument is that the Supreme Court of the United States' recent holding in *Carpenter* sets forth a bright line rule requiring the exclusion of any historical CSLI which was obtained without first obtaining a search warrant, as such is a violation of the Fourth Amendment. For this proposition, the defendant focuses on the language in *Carpenter* stating that "[b]efore compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one – get a warrant." Under the defendant's interpretation, Chief Justice Robert's use of the word "before" is dispositive, and necessarily implies that there can be no post-hoc determination of probable cause that would cure the original omission under the Fourth Amendment. Thus, the defendant implies, *Carpenter* does not permit the application of *Augustine II* to circumstances where there was no written affidavit accompanying the § 2703(d) application which would contemporaneously establish the facts which the Commonwealth later relies on for a post-hoc determination of probable cause. Further, the defendant implies, *Carpenter* directly contradicts the Supreme Judicial Court's finding in *Estabrook* that CSLI first obtained in violation of the warrant requirement was nevertheless admissible at trial pursuant to an after-acquired search warrant supported by untainted, independent probable cause.

However, the procedural history of *Carpenter* undermines the defendant's temporally-focused interpretation of that case. The ruling remanded the matter back to lower courts for further proceedings: it did not address the sufficiency of specific facts given in support of the § 2703(d) order, nor the merits of any exceptions to the exclusionary rule as applied to that case. Moreover, federal courts subsequently applying the holding in *Carpenter* have not given such great weight to the "before" language highlighted by the defendant. Instead, numerous federal

courts have admitted pre-*Carpenter* CSLI under the good-faith exception to the Fourth Amendment exclusionary rule. By and large, these courts have reasoned that prior to *Carpenter*, law enforcement had an objectively reasonable good-faith basis to believe that they were conforming to the law by obtaining CSLI pursuant to a § 2703(d) order, and thus suppression of such evidence would not serve any appreciable deterrence purpose. See *United States* v. *Goldstein*, 2019 WL 273103, *3 n. 28 (3rd Cir. Jan. 22, 2019) (collecting and following decisions in Second, Fourth, Seventh, and Eleventh Circuit Courts of Appeals which applied good-faith exception to pre-*Carpenter* CSLI collected under § 2703(d) orders). See also *United States* v. *Zodhiates*, 901 F.3d 137, 143-144, n.5 (2d Cir. 2018) (applying good-faith exception and noting that law enforcement reasonably believed order was lawful because all five federal circuits reviewing issue before *Carpenter* found that Fourth Amendment warrant requirement did not apply to historical CSLI).

Thus, neither the procedural history of *Carpenter*, nor subsequent federal precedent interpreting its holding, supports the defendant's temporal analysis that *Carpenter* mandates exclusion in this case under the Fourth Amendment purely because the warrant was obtained *after*, not *before*, the CSLI was originally collected under a § 2703(d) order. To the contrary, this court finds that the disputed CSLI is admissible under the good-faith exception to the Fourth Amendment, because it was collected at a time where existing federal precedent held that such data fell outside the Amendment's purview. See *id.* However, the applicability of the good faith exception to Fourth Amendment exclusion does not answer the question as to error under state constitutional law. *Commonwealth* v. *Hernandez*, 456 Mass. 528, 533 (2010), and cases cited ("We have not adopted the 'good faith' exception for purposes of art. 14 of the Massachusetts

Declaration of Rights or statutory violations, focusing instead on whether the violations are substantial and prejudicial.").

B. Article 14 of the Massachusetts Declaration of Rights

With the Fourth Amendment analysis settled, the court moves on to consider the defendant's secondary argument—that CSLI should be excluded under art. 14 in cases where, as here, the original § 2703(d) order was not accompanied by a contemporaneously written affidavit which would have provided a taint-free "snapshot" of the investigation from which courts could later conclusively determine pre-existing probable cause. As the defendant notes, there was no such affidavit in this case: the § 2703(d) order was issued solely on the basis of unrecorded in camera oral testimony to the District Court judge. Therefore, instead of analyzing a contemporaneous written affidavit as in *Augustine II*, the Superior Court trial judge based his findings of pre-existing probable cause on sworn testimony from a state trooper as to the contents of his prior oral § 2703(d) application testimony to the District Court.[15] The defendant claims this procedure falls outside the bounds of both *Augustine I* and *Carpenter*.

---

[15] The trial judge received testimony from Trooper Matthew Lavoie at the November 19, 2014 hearing. Lavoie testified that his routine practice in seeking a § 2703(d) order was to orally advise the District Court judge of "the basic facts of the case up to that time and how we believed the number was involved in the case." (Supp. Ex. E, p. 13). Lavoie then testified to the facts known to police in this case at the time he met with the District Court judge in camera to seek the August 3, 2010 § 2703(d) order for the defendant's CSLI. (Supp. Ex. E, pp. 13-19). These facts included trial evidence set out *supra*, along with a statement by Lisa Edwards, a friend of the victim's, that the victim had told her that the defendant was the father of her unborn baby, and that Edwards had received a message from the victim's Facebook account on the afternoon of July 29 claiming that the victim was in the hospital after an abortion procedure (police had confirmed that the victim was not in any area hospitals at that time). *Id.* Lavoie testified that the routine practice to which he had earlier testified, namely, orally advising the judge of the facts of the case up to that time, "was done in this case." (Supp. Ex. E., p. 18). Finally, Lavoie also testified that all of the facts known by police at the time of the August 3, 2010 § 2703(d) order were later memorialized in the affidavit accompanying the 2014 search warrant application. (Supp. Ex. E, p. 22). The trial judge credited Lavoie's testimony, and inferred that all of the facts to which Lavoie testified were recounted to the District Court judge on August 3, 2010, providing sufficient probable cause that the defendant was involved in the victim's probable murder, and the CSLI sought would provide evidence of the crime, including the defendant's movements on the night of the victim's disappearance. (Supp. Ex. F).

The Commonwealth argues that the court can consider sworn oral testimony when determining probable cause to search, because there is no explicit federal or state constitutional requirement that a search warrant application be supported by an affidavit. However, the case upon which the Commonwealth relies for this proposition, *Commonwealth* v. *Monosson*, 351 Mass. 327 (1966), expressly states that "the Superior Court may not give consideration to the sworn testimony additionally presented to the magistrate" in application for a search warrant. *Id.* at 330. *Monosson* considered the question of whether in ruling on a motion to suppress the fruits of a search warrant, the court could properly rely on prior oral testimony to a magistrate which was given to supplement a deliberately vague affidavit containing only the words "information from a reliable informant, whose information has proved reliable in the past." *Id.* at 328-329.

Although *Monosson* speaks only to the admissibility of oral testimony in addition to an insufficient affidavit, it cannot be logically extended to support an even more substantial violation of the affidavit requirements set out in G. L. c. 276, § 2A, namely the complete absence of any affidavit. See *Commonwealth* v. *Sheppard*, 394 Mass. 381 (1985) (noting that exclusion applied in *Monosson* because the use of oral testimony was a "prejudicial, and thus substantial, violation[] of the statute" which left the defendant unable "to challenge the search because of the Commonwealth's failure to preserve the grounds for the search in an affidavit."). This is particularly true given the *Monosson* court's specific contemplation of the difficulties faced in the case at bar: "the uncertainty of oral testimony as to what was otherwise stated to the magistrate," as well as the possibility of "surprise in case of some future shift in the rulings of the Supreme Court of the United States," and/or the Supreme Judicial Court. *Monosson*, 351 Mass. at 330.

Nevertheless, the Commonwealth urges this court to find that the statutory violation here does not rise to the level of a constitutional violation, and thus that exclusion is not required. Mere technical violations of c. 276 or art. 14, where the statutory and constitutional aims are still substantially satisfied, do not prejudice the defendant such that exclusion is required. See *Sheppard*, 394 Mass. at 390 (warrant's failure to specify objects of search did not require exclusion where affidavit had sufficient particularity, affidavit was present at search, and search did not exceed scope of affidavit). However, it is clear from existing precedent that failure to supply a written affidavit is not a mere technical violation of the statute: it is a substantial probable cause deficiency producing prejudice which ordinarily requires exclusion. *Id.* at 388-389 (reviewing the Court's analysis in *Monosson* and *Upton II* as to exclusion of evidence "seized in violation of the statutory requirements of a written, sworn statement establishing probable cause.").

This is true even though the good faith exception seems consonant with justice in this case, where the officers were unquestionably acting in good faith under existing law and would have needed uncanny prescience to anticipate the subsequent imposition of a warrant requirement for CSLI. See *Hernandez*, 456 Mass. at 533 (where art. 14 or statutory violations are "substantial and prejudicial," arguable good faith basis for officers' unlawful extraterritorial arrest not relevant to suppression analysis). Compare *Monosson*, 351 Mass. at 330 (oral testimony deliberately given instead of written affidavit required under existing law, "for the stated purpose of preserving 'the anonymity of the police undercover man'") with *Augustine I*, 467 Mass. at 256-257 ("At the time, there was no decision by the Supreme Court or, it appears, any lower Federal court suggesting that notwithstanding the government's compliance with the requirements of 18 U.S.C. § 2703(c)(1)(B) and (d), under the Fourth Amendment, a search

warrant based on probable cause was required. Nor was there a Massachusetts decision suggesting that art. 14 required a warrant.")

For these reasons, the court rejects the Commonwealth's argument that the initial CSLI search was legal under *Augustine I* and *II*, i.e., supported by probable cause sufficient to meet the warrant requirement of c. 276 and art. 14.[16] However, the admission of the defendant's CSLI at trial was not constitutional error because the Commonwealth had otherwise obtained that evidence pursuant to a warrant in 2014. *Estabrook*, 472 Mass. at 860 (despite "the 'primary illegality' of the Commonwealth's access to [the defendant's] CSLI pursuant to a § 2703(d) order," the admission of the CSLI was not erroneous where the subsequently acquired "search warrant for the same CSLI was secured . . . 'by means sufficiently distinguishable to be purged of the primary taint.'").

The affidavit in support of the 2014 warrant sets out ample probable cause derived from wholly untainted facts known to police before the August 3, 2010 acquisition of the defendant's CSLI: the victim was likely murdered using a class of firearms which included 9 mm handguns; the defendant made public statements implying that he carried a gun with 16 rounds, consistent with a 9 mm Beretta 92FS pistol; firearms records showed that the defendant registered a 9 mm Beretta 92FS pistol which had not been reported missing; the defendant was the likely father of the victim's unborn child, causing financial obligations to the victim and the ire of the defendant's wife; the victim told her friend that the defendant asked her to get an abortion; the defendant and the victim communicated extensively by cellphone throughout July 27, until shortly before the victim's cellphone activity ceased at 10:49 p.m.; and someone, probably not

[16] This finding moots the defendant's argument that the trial judge erred in concluding from suppression hearing testimony that the trooper had conveyed facts sufficient for probable cause to the District Court judge at the time of the § 2703(d) order.

the victim, sent a Facebook message from the victim's account on July 29, after she was reported missing, claiming that she was in the hospital after an abortion, although police determined that she was not a patient at any area hospitals.

Accordingly, the defendant has not met his burden under Mass. R. Crim. P. 30(b) to show that admission of his CSLI was constitutional error requiring a new trial. However, this finding does not per se establish that there is no taint to evidence acquired as a result of the original unlawful CSLI search, before the CSLI was obtained pursuant to the 2014 warrant. *Estabrook*, 472 Mass. at 859-866 (determining which statements, made by defendants after government illegally obtained CSLI, were fruits of illegal search which must be suppressed, although CSLI was separately admissible pursuant to later-acquired search warrant supported by independent probable cause). Accordingly, the court next considers the defendant's claim that his trial counsel was ineffective for failing to move to suppress such evidence as fruit of the poisonous tree.

III. Ineffective Assistance of Counsel

The defendant argues that his trial counsel provided ineffective assistance, where his failure to move to suppress the derivative evidence, along with the CSLI, deprived the defendant of an available, substantial defense. *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974) (defendant must prove "there has been a serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below [that] which might be expected from an ordinary fallible lawyer—and . . . whether it has likely deprived the defendant or an otherwise available, substantial ground of [defense.]"). Specifically, the defendant argues that he would have had success on a motion to suppress nearly all evidence obtained after police illegally acquired his CSLI on August 3, 2010, as fruit of the poisonous tree, including: the trial testimony

of Mawande Senene and any references thereto; the trial testimony of Joseph "J.D." Lang, and any references thereto; Detective Powell's trial testimony referencing Senene and Lang; the defendant's statement to police on August 5, 2010 that he only called his wife one time on July 27, 2010; the entirety of the defendant's statements to police on August 3, 2010; any references to the defendant's SUV, car or motorcycle or items seized therefrom, including cellphones; any references to anything seized from the defendant's home, including cellphones, a towel with red-brown stains, and handgun-related accessories; the testimony of David Tomasek, firearm dealer; the testimony of Deborah Lavoie, Barnstable town employee who issued the defendant's firing range permit; the defendant's range permit and firearms records; and all evidence that the defendant formerly owned firearms and practiced at a firing range.

Where, as here, the defendant argues that he would have prevailed on the merits of a motion to suppress information obtained after unlawful police conduct, "the issue is whether the evidence challenged has been obtained by exploiting the illegality or by means sufficiently distinguishable to dissipate the taint." *Commonwealth* v. *Fredette*, 396 Mass. 455, 458-459 (1985), citing *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). "Evidence obtained subsequent to unlawful police conduct does not automatically become sacred and inaccessible," but it is the Commonwealth who "bears the burden of proving that evidence subsequently obtained is untainted." *Id.* at 459, citing *Commonwealth* v. *Cote*, 386 Mass. 354, 362 (1982). There are three exceptions to the fruit of the poisonous tree doctrine: if "the government obtained [the evidence] through an independent source", if "the connection between the improper conduct and the derivative evidence has become so attenuated as to dissipate the taint," or "if the government can demonstrate that it would have inevitably discovered the evidence lawfully."

Commonwealth v. *Benoit*, 382 Mass. 210, 216-217 (1981) (internal quotations and citations omitted).

Accordingly, the court will consider in turn each category of evidence for any taint from the primary illegality of the August 3, 2010 CSLI search, before assessing whether the totality of any evidence found to be tainted resulted in prejudice to the defendant at trial such that he was deprived of an available, substantial ground of defense.

A. The Defendant's Statements to Police

The defendant argues that because police acquired his CSLI before the August 3 interview, trial counsel would have been successful in moving to suppress the entirety of his statements during that interview. Contra *Estabrook*, 472 Mass. at 859-860 (rejecting general claim for suppression of all statements made after police illegally obtained CSLI, in favor of "more individualized" inquiry). The defendant further argues that such a motion would also have been successful with regards to a particular statement made during his August 5 interview, asserting that he had only called his wife one time on the night of July 27. The Commonwealth argues that the motion would not have succeeded because the initial portion of the August 3 interview was not tainted by the CSLI. Specifically, the Commonwealth argues that it was the defendant who reached out to Barnstable Detective John York to "set the record straight" about his prior statements, and the CSLI was not raised by detectives until after the defendant made significant admissions. The Commonwealth further argues that the defendant's August 5 statements were consistent with the untainted statements in his August 3 interview, and that the defendant's CSLI was raised only briefly.

1. August 3, 2010 Interview

The August 3 interview transcript supports the conclusion that the initial portion of the interview was wholly untainted by the CSLI—indeed, investigators Det. York and Trooper Marc Powell largely let the defendant direct this portion of the interview, which was at his request. The defendant began by admitting that his relationship with the victim was not platonic, as previously asserted, because he had been having a sexual relationship with the victim since February, 2010. The defendant admitted the possibility of paternity of the victim's unborn child.[17] After prompting by Det. York, the defendant admitted that he had owned two guns, including a 9 mm handgun which he claimed had been stolen in Mississippi in 2008, but not reported because Nantucket police had previously taken his firearm license away. Det. York returned the conversation to the victim's disappearance, and asked the defendant for a timeline of his whereabouts on July 27. The defendant admitted he used his "truck"[18] to meet up with the victim to have sex at the Yarmouth motel at about 6 to 7 p.m., after which he left the motel, stopped at a McDonald's restaurant, and arrived home at 8 p.m., where he stayed for the rest of the evening. The defendant stated that the victim had sent him a text later that night, sounding irritated that the defendant had not returned to see her as they had previously agreed. He saw this message at approximately 9:35 p.m. The defendant claimed he could not return to see the victim because his motorcycle was broken, and his planned excuse to his wife, a "bike night" in Lowell, would not work. The defendant stated the victim was mad at him, so he called her and told her that his friend "Mo" was over at the defendant's house working on "movie stuff,"

---

[17] Later in the interview, before the defendant's CSLI was raised, the defendant claimed that he had been paying the victim's rent since April, 2010, and sending her weekly spending money, for an approximate total of $1,000 per month. The defendant also admitted, in response to a question by Det. York prior to CSLI being raised, that he and the victim talked about abortion a "couple times," wherein he told the victim that "it's going to mess up home" and to "try to keep it a secret as long as [they] can." The defendant further stated that the victim considered moving to Florida, but he told her that if she had the baby, he wanted "to be there."

[18] The defendant was referring to the vehicle he drove to the meeting with investigators, a Nissan Armada SUV.

although Mo was not actually there. The defendant stated he did not have any further conversations with the victim until the next morning, July 28, when he sent her a text message telling her to give him a call when she got back from Boston. The defendant claimed that when the victim did not reply to his first text, he sent two further text messages.

It was only after all of these statements that Det. York revealed to the defendant that they "had [his] cell phone information" and knew that on July 27, he "was not at [his] house the rest of the entire night." For that reason, the court rejects the defendant's contention that the entire interview was tainted by the CSLI illegally obtained by the Commonwealth earlier that day. The Commonwealth has met its burden to prove that the defendant's own actions in contacting the police, admitting his relationship with the victim, and setting out a timeline of his whereabouts on the night of her disappearance, were the independent cause of this evidence being produced, not the investigators' prior knowledge of the defendant's CLSI. Accordingly, the defendant would not have prevailed on a motion to suppress these statements as fruit of the poisonous tree.

However, there is clear taint requiring suppression of the defendant's statements in response to Det. York challenging his alibi with the CSLI. See e.g. *Estabrook*, 472 Mass. at 864-865) (suppressing as tainted fruit defendant's "statements in direct response to confrontation with evidence of his CSLI were made in close proximity to the illegality, [where] there were no intervening circumstances between the police questions based on the CSLI and [the defendant's] responses thereto."). The following statements were directly caused by the defendant's attempts to explain his illegally-obtained CSLI: the defendant's claim that he was out in his SUV on the night of July 27 to deal illegal narcotics; his claim that he made two cellphone calls on Service Road in the area of Barnstable around 10 p.m., one call to "Mo" to let him know that the victim might be calling, and one call to "JD" to sell him drugs; his claim that he made a single call to

his wife at "ten-something" to let her know he would be home in a little bit; his claim that he drove down Service Road, then Route 28 through Mashpee, then onto Newtown Road, returning home by midnight; and his denial that he ever called his wife a second time that night. The Commonwealth has not met its burden to prove that there was an independent source for these statements, that the connection between Det. York's use of the CSLI and these statements had become so attenuated as to dissipate the taint, or that the statements would have been inevitably discovered by lawful means. See *Fredette*, 396 Mass. at 458-459. Thus, the defendant would have been successful on a motion to suppress these statements about his whereabouts and activities, because they were obtained by investigators exploiting the primary illegality of the warrantless search of the defendant's CSLI. *Id.*

2. August 5, 2010 Interview

The defendant declined to have his August 5 interview recorded. The court bases the following findings on its review of Trooper Marc Powell's report memorializing the August 5 interview. In the first portion of the interview, the defendant repeated the description of his relationship with the victim and his whereabouts on July 27 that he had given to investigators on August 3, prior to Det. York bringing up the defendant's CSLI. (Supp. Ex. M, pp. 1-3). The defendant would not have prevailed in a motion to suppress these statements, as the August 3 interview is an independent, untainted source for the same statements. See *Benoit*, 382 Mass. at 216-217.

Trooper Powell then queried the defendant about his August 3 statements regarding drug sales to J.D. Lang, and told the defendant that investigators located Lang, who denied meeting with the defendant on July 27 or buying drugs. (Supp. Ex. M, p. 3). Additionally, Trooper Powell told the defendant that Lang stated he got a phone call from the defendant on August 3,

2010, where the defendant told Lang that someone was going to be calling Lang, and asked Lang to lie and tell the caller that Lang and the defendant were riding their motorcycles together on Service Road on the night of July 27. *Id.* In response, the defendant denied doing so, and reiterated his August 3 statement that he met up with Lang on Service Road to sell him drugs. *Id.* Lang's statements to investigators would have been inevitably discovered through lawful means, as discussed *infra* in §D. Thus, the defendant's responses have an independent source and would not have been suppressed as fruit of the poisonous tree. See *Benoit*, 382 Mass. at 216-217.

Trooper Powell thereafter asked the defendant what route he took home from meeting with Lang, asking if he was in Sandwich, Mashpee, or Falmouth, because his CSLI showed his cellphone in those locations. (Supp. Ex. M, p. 3). The defendant denied being in Mashpee or Falmouth, and stated he had his cellphone with him the entire night. *Id.* Trooper Powell told the defendant he made two calls to his wife that night, one after the defendant claimed he was already back at home. *Id.* The defendant stated he did not remember a second call, and reiterated that he returned directly home after meeting Lang. (Supp. Ex. M, p. 4). These statements were directly caused by Trooper Powell's use of the defendant's CSLI, particularly his focus on the second call to the defendant's wife, because that call was made using the tower near the Route 6 commuter parking lot in which the victim's rental car had been found. The Commonwealth has not proven any independent source for these statements, attenuation to dissipate the taint, or inevitable discovery by lawful means. See *Fredette*, 396 Mass. at 458-459. Accordingly, the defendant would have prevailed on a motion to suppress these statements as fruit of the poisonous tree.

Trooper Powell then told the defendant that investigators had contacted his friend "Mo" that he mentioned in the August 3 interview, who they determined to be Mawande Senene. (Supp. Ex. M, p. 4). Trooper Powell said Senene told investigators that the defendant had called him and told him that someone might be calling, and asked him to lie that he was with the defendant on the night of July 27. *Id.* The defendant denied telling Senene this, and stated that he did not know why Senene was lying. *Id.* The defendant did not respond to Trooper Powell's query as to why both of his friends, Lang and Senene, would be lying. *Id.* As discussed *infra* in §D, Lang and Senene's statements would have been inevitably discovered through lawful means unrelated to the defendant's CSLI, and thus there is an independent source for the defendant's responses to Trooper Powell's recounting of their interviews. See *Benoit*, 382 Mass. at 216-217. Accordingly, this portion of the interview would not have been suppressed as fruit of the poisonous tree.

Trooper Powell next questioned the defendant regarding carrying a gun when he was riding his motorcycle, noting that Senene had told investigators that the defendant once made a comment to that effect. (Supp. Ex. M, p. 4). The defendant replied that he had made a joke about carrying a handgun once, and repeated his prior untainted August 3 statements regarding owning a 9 mm pistol which was stolen in Mississippi after his license was taken away by Nantucket police. *Id.* There is an independent source for both of these statements: Senene told police about the defendant's handgun statement on August 2, prior to the acquisition of the CSLI, and the defendant had already claimed during the untainted portion of the August 3 interview that his 9 mm handgun was stolen from him in that fashion. Accordingly, these statements would not have been suppressed because they fall within an exception to the fruit of the poisonous tree doctrine. See *Benoit*, 382 Mass. at 216-217.

Trooper Powell concluded the interview by telling the defendant that a forensic team had located blood on his motorcycle and his car. (Supp. Ex. M, p. 4). The defendant replied that it was probably his blood on the motorcycle, because he worked on it frequently and may have cut himself on it in the past, suggesting that police should "test it." *Id.* This statement has an independent source in the lawful warrant search of his residential property and motorcycle, as discussed *infra* in §C, and thus would not have been suppressed. See *Benoit*, 382 Mass. at 216-217.

B. Firearm-Related Evidence

The defendant argues that he would have prevailed on a motion to suppress several forms of evidence relating to his ownership of a 9 mm Beretta 92FS, because investigators did not learn of the weapon until after the warrantless acquisition of the defendant's CSLI. As noted with respect to the defendant's August 3 interview, the defendant contacted investigators himself, and told them about the 9 mm handgun prior to Det. York raising the issue of the defendant's CSLI.[19] Further, evidence in the record establishes that police searched the firearms registration database prior to obtaining the defendant's CSLI, and thus knew that he had registered a 9 mm Beretta 92FS pistol, which was not reported stolen. Accordingly, the Commonwealth has sufficiently proven that there either was an independent source for, or would have been an inevitable lawful discovery of, all of the firearm evidence, due to the database search, the defendant's untainted statements, the caliber of ammunition found in the victim's rental car, and Senene's August 2 statement that the defendant implied he carried a gun. For that reason, the defendant would have not prevailed on a motion to suppress the testimony of David Tomasek, the firearm dealer who sold the defendant a 9 mm Beretta 92FS; the testimony of Deborah Lavoie, the Barnstable town

[19] In addition, police reports show that the defendant's wife told police during her July 30 interview that the defendant had owned a gun, although she was unsure if he still had it.

employee who issued the defendant's firing range permit; the defendant's range permit and firearms records; and any further evidence that the defendant formerly owned firearms and practiced at a firing range. See *Benoit*, 382 Mass. at 216-217.

C. Evidence Arising from Warrant Searches of the Defendant's Home and Vehicles

Next, the defendant argues that he would have prevailed on a motion to suppress any references to his SUV, motorcycle, and items seized therefrom, including cellphones, and any references to anything seized from his home, including cellphones, a towel with red-brown stains, and handgun-related accessories. As discussed above, police searched the defendant's home and vehicles pursuant to search warrants issued on August 4 and August 6, 2010, respectively. (Supp. Ex. I, J, K).

Although the affidavits in support of those warrants contain the defendant's CSLI and facts arising therefrom, there is still sufficient probable cause to issue the warrants if this tainted information is excised from the affidavits. Taken alone, just the information obtained by investigators prior to August 3 was sufficient to establish probable cause that the defendant murdered the victim and evidence of the crime could be found in his home or vehicles. Moreover, the defendant's untainted August 3 admissions, that he owned a handgun consistent with the ammunition found in the victim's rental car and was having a complicated sexual relationship with her, further strengthened this probable cause.

Accordingly, the Commonwealth has proven that the evidence obtained as a result of the execution of these search warrants was lawfully obtained from an independent source such that its discovery was inevitable. See *Commonwealth* v. *Gray*, 465 Mass. 330, 345-347 (2013) (evidence seized pursuant to search warrant admissible as long as the attendant affidavit contained sufficient information to establish probable cause apart from evidence found during a

prior illegal search). For that reason, the aforementioned evidence seized from the defendant's home and vehicles would not have been suppressed.

D. Trial Testimony By or Regarding Lang and Senene

The defendant next argues that he would have prevailed on a motion to suppress the trial testimony of Joseph D. ("J.D.") Lang and Mawande Senene, as well as Det. York's testimony regarding those two individuals. The Commonwealth argues that the call logs of the victim and defendant, legally obtained by subpoena on August 2, would have led investigators to Lang and Senene anyways. Those call logs showed that the defendant communicated with Lang and Senene's numbers on July 27 and 28, and that the victim repeatedly called Senene on July 27 shortly before her cellphone activity ceased.

Investigators were already interested in Lang's involvement prior to receiving the defendant's CSLI, as demonstrated by the inclusion of Lang's CSLI in the same order.[20] The court notes that investigators told Lang about the defendant's tainted statements claiming he sold drugs to Lang on Service Road that evening, which could have provided Lang with motive to admit his initial false statements providing an alibi for the defendant. However, this use is not determinative, where Lange likely would have admitted to this falsehood anyways when confronted with his own CSLI showing him present in Harwich that night. Thus, the Commonwealth proved that police would have inevitably discovered, through lawful means, Lang's statements recounting the defendant's request that he lie to police to provide an alibi.

Turning to Senene, it is clear that his first police interview, conducted on August 2, cannot be a product of the CSLI obtained the following day. Given the inevitable discovery of Lang's statements that the defendant had asked him to lie to provide an alibi in the area of

[20] The defendant does not challenge the production of Lang's CSLI.

Service Road on the evening of July 27, it is exceedingly likely that investigators would have re-interviewed Senene to ask him if he had received a similar request. As such, the Commonwealth has met is burden to prove inevitable discovery by lawful means of Senene's statements detailing his July 28 interaction with the defendant regarding someone calling to ask if the men were together on the evening of July 27.

For those reasons, the defendant would not have prevailed on a motion to suppress any portion of Lang or Senene's trial testimony, or any other testimony referencing their police interviews. See *Benoit*, 382 Mass. at 216-217.

E. Effect of Tainted Evidence at Trial

Having determined which trial evidence could have been suppressed as tainted if trial counsel had brought such a motion, the court now considers whether the defendant was prejudiced by this error such that he was deprived of a substantial ground of defense. "An error is non-prejudicial . . . '[i]f . . . the error did not influence the jury, or had but very slight effect." *Commonwealth* v. *Reyes*, 464 Mass. 245, 259-260 (2013), quoting *Commonwealth* v. *Flebotte*, 417 Mass. 348, 353 (1994). To determine the influence on the jury, the court considers "the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; the availability or effect of curative instructions; and the weight or quantum of evidence of guilt." *Commonwealth* v. *Thomas*, 469 Mass. 531, 552 (2014) (internal quotations omitted).

Here, the evidence which could have been suppressed was solely comprised of false statements to investigators by the defendant as to his travels and activities on particular roads in

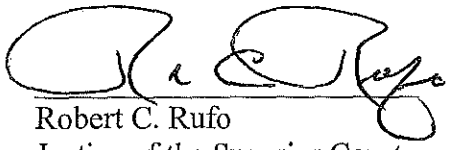
Barnstable County on the night of July 27, as well as his denials that he called his wife more than one time that evening. This evidence was relevant only to the defendant's consciousness of guilt. As such, it was merely cumulative of other substantial evidence that the defendant attempted covering up his involvement in the victim's murder: the defendant's initial denials of his relationship with the victim and the paternity of her unborn child, his claims that he did not meet up with the victim a second time that evening, and his requests to Lang and Senene to falsely say they were with him on the night of July 27.

This evidence was also of minimal importance in the prosecution's case. The crux of the prosecution's case was the defendant's CSLI showing him with the victim on the night of July 27, near the locations where her body and rental car were later found, and the data transmissions from the victim's cellphone after she was reported missing that originated in the area of the defendant's employer and along his garbage truck route. This location evidence, presented with evidence establishing the defendant's ownership of a 9 mm Beretta 92FS consistent ballistics evidence from the rental car and the victim's remains, provided very strong evidence that the defendant was the culprit. The paternity of the fetal remains, and the untainted consciousness of guilt evidence, made proof of the defendant's guilt overwhelming; no consideration of the tainted statements was necessary. See *Thomas*, 469 Mass. at 552.

Accordingly, this court is confident that trial counsel's failure to move to suppress post-CSLI evidence as fruit of the poisonous tree did not deprive the defendant of an available, substantial ground of defense because the tainted statements had minimal, if any, effects on the jury such that the error was non-prejudicial. See *Reyes*, 464 Mass. at 259-260. Accordingly, the defendant is not entitled to a new trial under rule 30(b) due to a violation of his constitutional right to counsel. See *Saferian*, 366 Mass. at 96.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Motions for a New Trial and an Evidentiary Hearing are **DENIED**.



Robert C. Rufo
Justice of the Superior Court

DATED: February 25, 2019